

UNITED STATES COURT OF APPEALS

AUG 28 2003

TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

FRANK EDWARD VANN,

Defendant - Appellant.

No. 02-6303
(D.C. No. 99-CV-710-M)
(W.D. Okla.)

ORDER
DENYING CERTIFICATE OF APPEALABILITY

Before **KELLY, BRISCOE**, and **LUCERO**, Circuit Judges.

Defendant-Appellant Frank Edward Vann, a federal prisoner appearing pro se, seeks a certificate of appealability (“COA”) to appeal the district court’s denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. We deny his request for a COA and dismiss the appeal.

On January 22, 1997, Mr. Vann was indicted for conspiracy, substantive charges involving cocaine powder and cocaine base, and money laundering. The government offered to drop all other charges if Mr. Vann agreed to plead guilty to one count of conspiracy to distribute cocaine powder in violation of 21 U.S.C. § 846. Mr. Vann pled guilty as agreed and on June 6, 1997, he was sentenced to a

term of imprisonment of 292 months and 60 months of supervised release. Mr. Vann appealed his sentence to this court alleging: (1) error in the four-level enhancement of his offense level for being a leader in an illegal enterprise and (2) error from admission at the sentencing hearing of certain evidence lacking a minimal indicia of reliability. We affirmed in an unpublished opinion. United States v. Vann, 133 F.3d 933, 1998 WL 17765 (10th Cir. Jan. 20, 1998). The United States Supreme Court denied Mr. Vann's petition for certiorari. Vann v. United States, 523 U.S. 1132 (1998).

In his § 2255 motion, Mr. Vann alleged: (1) violation of the core concern of Fed. R. Crim. P. 11(c)(1) by the sentencing court's failure to inform him of the consequences of his guilty plea; (2) entitlement to a downward departure based on his rehabilitative accomplishment since his incarceration; (3) ineffective assistance of counsel; and (4) various sentencing errors, including: (a) violation of his Fifth Amendment right to a fair sentencing hearing; (b) plain error in sentencing him based upon the erroneous assumption that nine kilograms of cocaine powder converts to nine kilograms of crack cocaine; (c) that the sentence itself is unconstitutional and invalid in light of Apprendi v. New Jersey, 530 U.S. 466 (2000); and (d) the district court erred by failing to eliminate a two-point increase pursuant to U.S.S.G. § 4A1.1(d) to his criminal history computation. Mr. Vann's ineffective assistance claim was based on: (a) counsel's failure to call

witnesses at sentencing to testify as to whether the information underlying the sentencing was correct; (b) counsel's failure to object when the court sentenced him based on an erroneous assumption that nine kilograms of cocaine powder converts to nine kilograms of crack cocaine; and (c) counsel's failure to move for withdrawal of the guilty plea when the court failed to inform Mr. Vann of the direct consequences of that plea.

In light of the claims he advanced on direct appeal, the district court concluded that unless Mr. Vann could demonstrate cause and prejudice or a fundamental miscarriage of justice, he would be procedurally barred from asserting every claim except those involving ineffective assistance. After carefully considering the merits of Mr. Vann's ineffective assistance claims and noting that Mr. Vann's understanding of the facts was flawed, the court concluded that counsel's performance was not deficient in any respect. The court also reached and denied on the merits Mr. Vann's Apprendi claim and his request for a post-incarceration downward departure. Additionally, the court denied his request for an evidentiary hearing. Finding that Mr. Vann failed to show cause and prejudice or a fundamental miscarriage of justice, the district court concluded that each of Mr. Vann's claims failed either on the grounds of procedural bar or on the merits. Accordingly, the district court denied Mr. Vann's § 2255 motion.

On appeal, Mr. Vann simply reasserts many of these same arguments,

including the Apprendi claim, the failure of the sentencing court to eliminate a two-point increase to the criminal history computation, plain error in an erroneous assumption that nine kilograms of cocaine powder converts to nine kilograms of crack cocaine, violation of the core concern of Fed. R. Crim. P. 11(c)(1) by the sentencing court's failure to inform him of the consequences of his guilty plea, and all three bases for ineffective assistance of counsel.

Issuance of a COA is jurisdictional. Miller-El v. Cockrell, 123 S. Ct. 1029, 1039 (2003). A COA can issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a claim on the merits, the applicant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where the district court has denied a claim on procedural grounds, the applicant must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

After carefully reviewing the district court's order, Mr. Vann's briefs, and the record on appeal, we conclude that none of the district court's procedural rulings or merits determinations would be debatable among jurists of reason.

Thus, for substantially the reasons relied upon by the district court, we DENY the request for a COA and DISMISS the appeal. Mr. Vann's request to proceed in forma pauperis is GRANTED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge